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Supreme Court of the United States.

October Term, 1932.

No. 228.

George A. Ohl & Company,
Petitioner,

v.

The A. L. Smith Iron Works,
Respondent.

No. 229.

Same v. Same.

Brief for Respondent in Opposition to the Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

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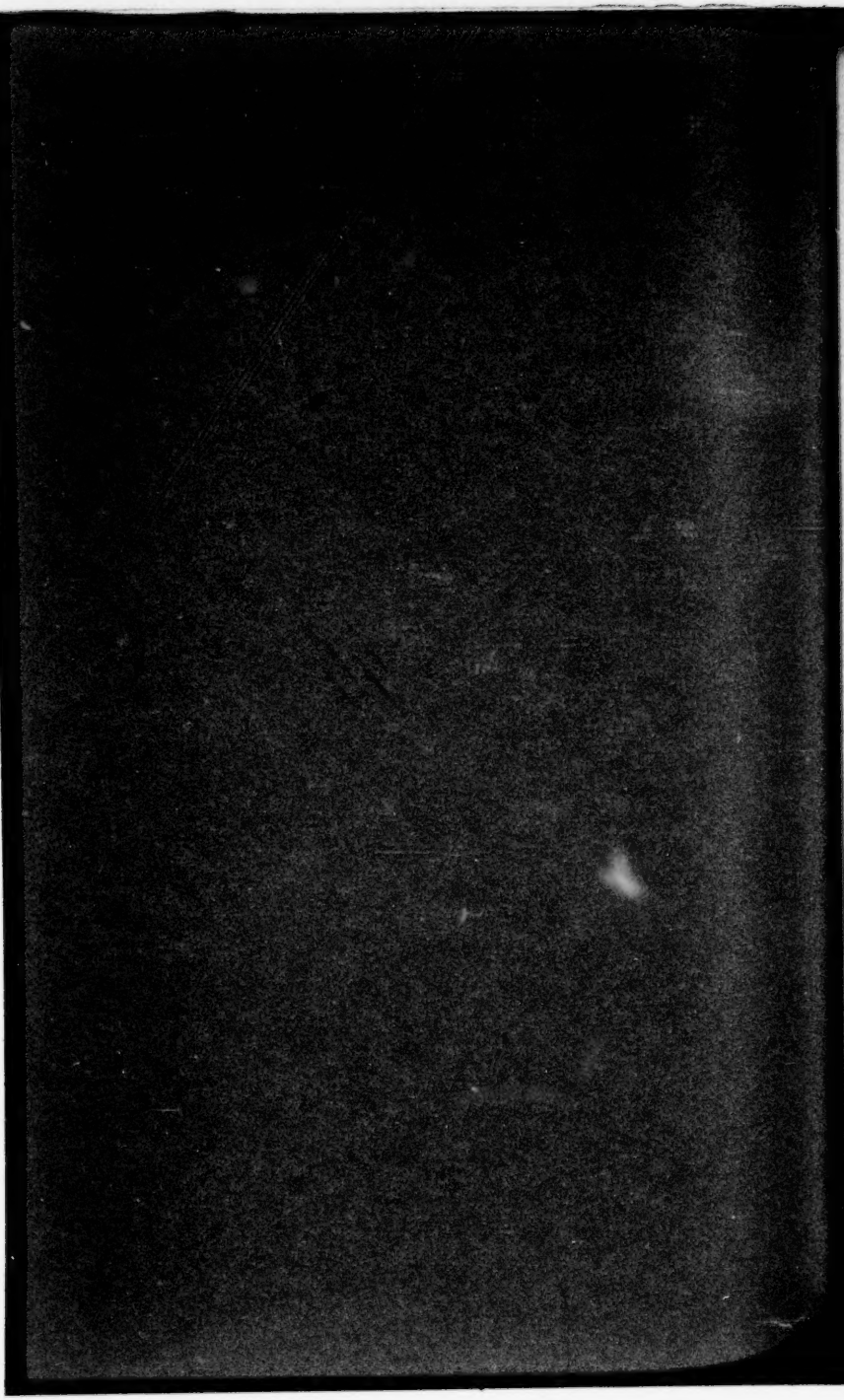

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Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 228.

GEORGE A. OHL & COMPANY,
PETITIONER,
v.
THE A. L. SMITH IRON WORKS,
RESPONDENT.

No. 229.

SAME *v.* SAME.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

I.

RULE 35 OF THE UNITED STATES SUPREME COURT.

Rule 35, paragraph 2, seems to limit the contents of the petition for a writ of certiorari to a "summary and short statement of the matter involved and the reasons relied on for the issuance of the writ." It further provides "A supporting brief may be included in the petition, but . . . it must be direct, concise . . ."

It is assumed by the respondent that the true issues raised by the petition are fully and succinctly stated in the opinion of our Circuit Court of Appeals—

57 F. (2d) 44 (Record, p. 264 *et seq.*)—

and do not require or justify the inclusion, by reference or otherwise, of such extraneous matter as the petitioner's brief to the Circuit Court of Appeals, petition for rehearing, affidavits, certificates, and the like.

However, the respondent states merely its understanding of the latitude of the rule, and hereinafter deals with some of these documents upon the assumption that the Court may deem them to be relevant.

II.

Facts.

The respondent proceeds to a statement of those facts and proceedings which it understands to be pertinent under the rule.

The original writs in the cross-actions between these parties were brought in the latter part of 1927 (Record, pp. 2, 227).

The action by the Ohl Company (petitioner) was based on a series of notes representing the balance of the purchase price of a machine which it had sold to the Smith Works (respondent) (Record, pp. 2-3).

The action by the respondent was based on breaches of warranty, express and implied, under which said machine was sold (Record, p. 228).

The answer to the action on the notes was a general denial, lack of consideration, and failure of consideration (Record, p. 3).

The answer to the action on the breaches of warranty was a general denial and acceptance of the machine (Record, p. 231).

The respondent, in compliance with the requests of the petitioner, filed certain specifications of defects in and failures of the machine to perform the uses to which the parties intended it to be applied (Record, pp. 8-11, 233).

The actions were tried together before a jury in April and May of 1929, and the trial consumed about three weeks (Record, p. 4).

In the action by the petitioner the jury returned a verdict for the respondent. In the action by the respondent the jury returned a verdict for the respondent in the sum of $7500. These verdicts were returned on May 7, 1929 (Record, pp. 5, 234).

On May 9, 1929, the petitioner filed a motion for a new trial in each case.

In the action brought by the petitioner the motion was specifically confined to certain alleged misconduct of one or more of the jurors and to "the verdict as it concerned the defendant's damage" (Record, pp. 5, 6, 206, top).

In the action brought by the respondent the petitioner's motion was confined to the same grounds except that the word "plaintiff" was substituted for the word "defendant" (Record, p. 235).

These causes were thence continued from term to term to the March term, 1930, *i.e.*, May 14, 1930, on which date they were set down for hearing and overruled (Record, pp. 6, 235).

On August 8, 1930, a writing was filed entitled "Substitute Bill of Exceptions on Behalf of George A. Ohl & Company," and this writing contains the notation "Allowed August 20, 1930, J.A.L. D.J." This paper was expressly made applicable to both cross-actions and so treated (Record, pp. 7, 236).

Near the bottom of page 2 of the petition it states that "the trial judge, in counsels' presence, examined the bills and orally allowed them." If material, the respondent points out that this statement is presumably an inadvertence; since the filing of its petition the petitioner has ad-

dressed a communication to the Court amending said statement so as to disclaim any possible inference that the respondent's counsel was present on that occasion.

On September 8, 1930, judgments were entered as follows: For the respondent in the action by the petitioner; and for the respondent in the sum of $7500 in its action against the petitioner (Record, p. 236).

Petitions for appeal were filed and allowed November 25, 1930 (Record, pp. 222, 237).

The clerk of the District Court certified the appeals on January 22, 1931 (Record, pp. 226, 263).

The cases came on to be argued before the Circuit Court of Appeals on October 22 and 23 of 1931 (Record, p. 264).

At the outset of the respondent's brief, and before proceeding to a discussion of the petitioner's assignments of error, the respondent moved that the alleged bills of exceptions be stricken from the record, and assigned reasons therefor in its said brief (Footnote to page 4 of the petition) (Opinion of Judge Morris, Record, pp. 266-267).

On March 22, 1932, the Circuit Court of Appeals rendered its opinion affirming the judgments of the District Court, with interest and costs (Record, p. 270).

On April 20, 1932, the petitioner filed an application for rehearing to the Circuit Court of Appeals, and on May 6, 1932, said application was denied (Record, p. 313).

The respondent submits that under Rule 35 the petitioner is confined to the foregoing record facts, and exceeds the latitude of the rule by incorporating in its petition, by reference or otherwise, and by discussing matter contained in the so-called bills of exceptions, statements and affidavits grafted onto the record.

However, out of an abundance of caution and in the interest of accuracy, the respondent will at this point comment on a few of the extraneous suggestions of the petitioner. The petitioner says, on page 2, lines 8 to 11 of its petition, that the machine in question was in use at the respondent's factory at the time of trial. Whatever the pur-

pose of this statement may be, the respondent points out that its action is for breach of warranties; it further points to a few portions of the testimony to which the petitioner has failed or neglected to call the Court's attention. For example: the material wrought by the machine was "bowed" in such a way as not to be a commercial job (Record, pp. 65-66). On October 15, 1926, the machine broke at two vital places while being operated under the supervision of Professor Swett and his assistant, Mr. Townsend, both of the faculty of the Massachusetts Institute of Technology (Record, pp. 68, 94). Because of the necessary repairs required by the fractures, some 18 inches in the usable length of the machine were lost (Record, p. 69). The machine was not properly constructed, because of the lack of an efficient safety device (Record, pp. 97-98). There were blow-holes in the casting of the stanchions which supported the machine (Record, pp. 177-179). Even before the machine broke, its value was about $2500 (Record, p. 116). The machine was not strong enough to set (form) ⅜ inch material into stair-treads, stair-stringers, and stair-risers (Record, pp. 181, 15).

In this connection the respondent respectfully directs the Court's attention to the language of the warranty relating to the machine (Record, p. 11) and the specifications referred to in said warranty (Record, p. 49, top).

At page 2 of its petition, line 12, the petitioner calls the verdicts "absurd." If any answer is necessary to this charge the respondent respectfully refers to the fact that, as the record discloses, the jury returned its verdicts only after three weeks of fairly intensive trial, during which a mass of conflicting oral evidence, many documents, letters and photographs, and specimens of the products of the machine were introduced; the presiding judge denied motions for new trials (Record, pp. 5-6, 235). And the Circuit Court of Appeals in its opinion stated that the pleadings in the case were in form to raise the issues between the parties (Record, p. 266).

On page 2 of its petition, line 18, the petitioner states that the "verdicts resulted in the respondent's retaining the petitioner's property without paying for it and being awarded damages because the machine was not worth the contract price."

Whatever may be the purpose of this statement, the respondent points out the following evidence: The contract price was $12,000, in round numbers (Record, p. 11); the petitioner stated the machine was worth $3000 more than the contract price (Record, p. 34); there was evidence from which the jury could have found that the machine was worthless when it was delivered in that it was incapable of turning out merchantable products and was so defective in workmanship and material (which, under the warranty, were to be "of the best"—Record, p. 11) that it broke shortly after its delivery under a test far below the maximum requirements of the express warranty (Record, p. 94); so that the jury could have further found that the difference between the value of the machine as warranted and represented by the petitioner and its true market value was at no time less than $15,000. The jury were further warranted in finding on the evidence that, in order to prevent the machine from collapsing, the respondent expended $2500, in round numbers (Record, p. 110), making total damages suffered by the respondent of $17,500. The respondent owed the petitioner a balance of $6500, in round numbers (Record, p. 7). Thus the jury could have found for the respondent in its action for breach of warranty in the sum of $17,500 and for the petitioner in the sum of $6500 in its action on the notes; or, the jury could have applied first to the action on the notes so much of the said sum of $17,500 as would be sufficient to cancel them and award the excess to the respondent in its own action. The latter course was approved by the Supreme Judicial Court of Massachusetts in—

Star Glass Co. v. *Morey*, 108 Mass. 570, 573.

But the jury evidently regarded the machine as being worth something or discounted its overvaluation by the petitioner, with the result that it reduced the possible balance recoverable by the respondent in its action by $3000, namely, to $7500.

It follows from this analysis that the respondent did not retain the machine without paying for it, but that, on the contrary, the verdicts clearly indicate that the amount of the notes plus the award to the respondent in its case aggregate less than the damages suffered by the respondent. It will also be recalled that the respondent's answer to the action on the notes consisted of a general denial and lack and failure of consideration—not recoupment.

Incidentally, the machine in question weighed 108,000 lbs. (Record, p. 43). It required a special foundation upon which to erect it (Record, p. 62). It was 12 feet 6 inches wide (Record, p. 11), and over 10 feet in height, as is indicated by one of the exhibits; to bend ⅜ inch thick steel into merchantable products it had to exert a pressure of 800,000 lbs. according to the evidence of one expert and about 2,000,000 lbs. according to the evidence of another expert (Record, p. 95). Obviously, such a massive structure could not be easily dismantled or returned without even greater damage to the machine and expense to the petitioner than has already been shown.

III.

Comments on the Petitioner's Suggestions Relative to the Alleged Bills of Exceptions.

At page 14 *et seq.* of the petition and brief the petitioner has undertaken to set forth an "outline of some of the substantial issues involved in trial . . . to show that the questions raised merited consideration in the Court of Appeals."

The respondent cannot foretell whether or not this Court is concerned with the issues raised at the trial of these causes. But, if the Court should consider them relevant or

of interest it is respectfully submitted that the petitioner was, in any event, restricted in its appeal to the precise questions raised by its assignments of error.

Having carefully read the portion of the petitioner's brief, above referred to, and compared the references to the assignments therein with the text of the actual assignments as they appear in the record, the respondent submits that, in each instance, the interpretation and paraphrasing of such assignments by the petitioner is not in accordance with the text thereof.

In the interest of brevity the respondent has avoided a detailed comparison of each paragraph of the petition referred to with the corresponding assignments. Nor has the respondent any basis upon which to meet the assertions at page 14 of the petition and brief, even if it were permissible, because of the apparent variances between said assertions and the texts of the assignments of error referred to.

Argument.

Primarily, the petitioner's grievance would seem to be due to the refusal of the Circuit Court of Appeals to treat the so-called bills of exceptions as being properly before it because of lack of proper authentication.

At no point in the petition, itself, or in the brief accompanying it, does the petitioner seem to question the conclusion of our Circuit Court of Appeals that the alleged bills of exceptions were defective in this respect, unless the petitioner's contention at page 16 *et seq.* of its brief, that said conclusion conflicts with the opinion of the Eighth Circuit in *Steen* v. *First National Bank,* 298 Fed. 36, implies that our Circuit Court of Appeals erred in that respect. That point will be discussed in its order.

The petitioner further contends that our Circuit Court of Appeals erred in refusing to treat such authentication as harmless error or in refusing to permit the bill to be amended.

So that by way of reduction of the fundamental issues upon which we assume the reasons for the petition, pp. 5-6, are predicated, we submit the following:

(A) Were the bills of exceptions authenticated as required by section 4 of the Act of June 1, 1872, c. 225, now section 953 of the Revised Statutes (28 U.S. C.A. 776)?

(B) Should the Circuit Court of Appeals have treated the lack of authentication as "harmless error"?

(C) Did the Circuit Court of Appeals err in refusing to permit amendments to cure the defects in the so-called bills of exceptions after the expiration of the term?

A.

The Bills of Exceptions were Not Authenticated as Required by Section 953 of the Revised Statutes.

As the opinion of our Circuit Court of Appeals points out, this Court has emphatically said that initials upon a paper entitled "bill of exceptions" do not constitute the signature required by said section 953 of the Revised Statutes.

> *Origet* v. *United States*, 125 U.S. 240, 244; 57 F. (2d) 44 (Record, p. 267).

And our Circuit Court points out in its opinion that this Court has adhered to the rule laid down in *Origet* v. *United States* in a later case in which the precise question was again raised.

> *United States* (*ex rel. Kinney*) v. *U.S. Fidelity Co.*, 222 U.S. 283.

Kinney v. *U.S. Fidelity Co.*, 222 U.S. 283, was decided by the Court in 1911, but our Circuit Court is further confirmed in its conclusion by a still later opinion of this Court which

reiterates the rule of *Origet* v. *United States,* 125 U.S. 240, 244.

Krauss Brothers Lumber Co. v. *Mellon,* 276 U.S. 386, 390.

In the case of *Steen* v. *First National Bank,* 298 Fed. 36, cited at page 16 of the petitioner's brief, there was no question as to the judge's *signature.* The full name and title of the judge were subscribed. They merely appeared in a space below the blank provided for the signature. The position of the signature being the only question raised, the Circuit Court of Appeals for the Eighth Circuit refused to dismiss the bill.

It would seem that the point involved in the case at bar is clearly distinguishable from the point in the Steen case.

The opinion in *Krauss Bros. Lumber Co.* v. *First National Bank* was handed down April 9, 1928; whereas the opinion of the Circuit Court of Appeals in the Eighth Circuit in the case of *Steen* v. *First National Bank,* 298 Fed. 36, upon which learned counsel for the petitioner relies to establish a conflict between that circuit and ours on that point, was decided in 1924.

This exposition of the law would seem to eliminate not only the possibility of alleged conflict between circuits, but also any vestige of doubt as to the accuracy of the conclusion of our Circuit Court of Appeals on this point.

B.

The Circuit Court of Appeals was Right in Refusing to Treat the Lack of Authentication as Harmless Error.

In its opinion, 57 F. (2d) 44 (Record, pp. 264, 266), our Circuit Court of Appeals says: "Counsel for the Smith Company (the respondent) take the position that there is a fatal defect in the record, in that the bill of exceptions filed

by the Ohl Company (the petitioner) is not properly authenticated, and for this reason they move that the bill of exceptions be stricken from the record."

At page 269 of its opinion the Circuit Court of Appeals goes on to say: "In the Origet and Kinney cases above cited the Supreme Court was interpreting an Act of Congress and in so doing it held that a bill of exceptions was not sufficiently authenticated unless signed by the judge of the court and that the initials of the judge do not satisfy the provisions of the statute. We are bound by this ruling of the Supreme Court."

Later, in the same paragraph, the Court proceeds: "We see no escape from an order affirming the judgments of the District Court."

The respondent infers that the Circuit Court of Appeals regarded the defect in the authentication as fatal and not as merely trivial.

The "Harmless Error" rule was recognized by this Court long before its translation into statutory form in 1919 (St. February 26, 1919, c. 48, now part of U.S. Code, tit. 28, sec. 391).

Gilmer v. *Higley,* 110 U.S. 47.
Vicksburg &c. Rd. v. *O'Brien,* 119 U.S. 99, 109.
Kalanianole v. *Smithies,* 226 U.S. 463.
Seaboard Railway v. *Moore,* 228 U.S. 433.

It introduces no new principle except that it throws the burden on the complaining party to show by the entire record the denial of some substantial right.

Shuman v. *United States,* 16 F. (2d) 457, 458.

Section 953 of the Revised Statutes, which deals with the method of authenticating a bill of exceptions in the Federal Court, has been in existence since 1875.

Krauss Brothers Co. v. *Mellon,* 276 U.S. 386.

Every one of the following cases, dealing with Revised Statutes 953, have emphasized the necessity of such authentication.

Origet v. *United States*, 125 U.S. 240, 244—1887.
Malony v. *Adsit*, 175 U.S. 281—1899.
Oxford &c. Rd. Co. v. *Union Bank*, 153 Fed. 723—
United States (*ex rel. Kinney*) v. *U.S. Fidelity Co.*, 222 U.S. 283—1911.
Krauss Brothers Co. v. *Mellon*, 276 U.S. 386, 390—1928.

It would seem to be a fair inference from these cases that the Courts have treated such authentication as being a condition precedent to any consideration of a proposed bill of exceptions, and it is noteworthy that none of the Courts, above referred to, which dealt with this lack of due authentication ruled that it constituted mere harmless error. Both the harmless error rule and the authentication statute were in existence concurrently throughout the period covered by the earliest and the latest of the above-cited cases.

The due allowance of a bill of exceptions is a judicial and not a ministerial act, and cannot even be waived by the parties.

Malony v. *Adsit*, 175 U.S. 281.
Goetzinger et al. v. *Woodley et al.*, 17 F. (2d) 83.

Our Circuit Court of Appeals must be presumed to have had the harmless error statute in mind in adopting the following language employed by Pritchard, J., in *Oxford &c. Rd. Co.* v. *Union Bank*, 153 Fed. 723, 728:

> "While it is not the policy of the Court to dismiss writs of error in cases on appeal on account of slight technicalities, at the same time, the rules of this Court as well as the rules of the Circuit Court are plain and easily understood. In this case the provision of the statute relating to the question at issue is mandatory and must be enforced. It is incumbent upon attorneys

who practice in the federal Courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions."

In the case just quoted from, the trial judge had certified that he ". . . has allowed, settled and signed within the time allowed by law and the orders of the said judge the attached bill of exceptions and hereby orders the same to be filed August 24, 1906. (Signed) THOS. R. PURNELL, U.S. Judge."

But the recital in the opinion shows that there was nothing to indicate to the Circuit Court of Appeals that the judge had signed the "attached bill of exceptions." He had apparently signed only the certificate.

Obviously, our Circuit Court of Appeals adopted the ruling of the Circuit Court of Appeals in the case of *Oxford &c. Rd. Co.* v. *Union Bank*, 153 Fed. 723, 728, which was followed and approved in respect of the indispensable necessity of the judge's signature to validate the bill of exceptions in the case of *Knight* v. *Illinois Central Rd. Co.*, 180 Fed. 368, 371 (C.C.A. 6).

The respondent knows of no circuit that has failed to follow this rule where the question was squarely raised.

It is therefore submitted that the lack of proper attestation by the trial judge upon the so-called bills of exceptions in the instant cases was not mere harmless error, that it was incumbent upon the Court to hold that there was no bill of exceptions before it, and that the assignments of error could therefore not be considered.

C.

The Circuit Court of Appeals did Not Err in Refusing to Permit Amendments to Cure the Defects in the So-called Bills of Exceptions.

It is true that the Circuit Court of Appeals did not, of its own motion, cure the defects which it found in the bills of exceptions.

On pages 4 and 5 of the petition learned counsel for the petitioner complains that in concluding that the lack of a proper judicial signature evidencing the allowance of the bills of exceptions was a substantial defect, the Circuit Court of Appeals ignored "the rule announced and the course followed by this Court in *Mich. Ins. Bank* v. *Eldred,* 143 U.S. 293, and *United States* (*ex rel. Kinney*) v. *U.S. Fidelity Co.,* 222 U.S. 283."

After reading the two cases just cited counsel for the respondent fails to understand the purpose of the petitioner in citing them. In the case of *Michigan Insurance Bank* v. *Eldred,* as counsel for the respondent reads and understands it, the defendant prevailed in the trial Court; thereupon, the plaintiff alleged and tendered exceptions which were duly allowed. The excepting party came to this Court on a writ of error with a bill of exceptions incorporated therein. While the writ was pending here and long after the term of the trial Court had expired, the plaintiff asked the trial Court to allow amendments to the bill of exceptions which had been theretofore duly allowed, and the trial Court purported to allowed said amendments, *nunc pro tunc,* as of the date of the allowance of the original bill of exceptions. Thereupon the plaintiff presented a petition to this Court asking for a writ of certiorari containing a so-called amended bill of exceptions, the writ of error being still before this Court.

This Court said in its opinion:

> "By the uniform course of decisions, no exceptions to rulings at a trial can be considered by this Court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of the Court, or by the consent of the parties; and save under very extraordinary circumstances, they must be allowed by the judge and filed with the Clerk

during the same term. After the term has expired, without the Court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this Court, all authority of the Court below to allow a bill of exceptions, then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end." After further observations the Court proceeds: "The writ of certiorari prayed for must therefore be denied and the case must be determined upon the original bill of exceptions."

While it is true that the Court ordered a new trial, it did so for reasons wholly apart from the attempted amendments to the original bill of exceptions.

In the case of *United States* (*ex rel. Kinney*) v. *U.S. Fidelity Co.*, 222 U.S. 283, this Court said, at page 284:

"As to the contentions which relate to occurrences at the trial, they cannot be considered, as the record contains no bill of exceptions. The paper in the record styled 'exceptions to the charge to jury,' initialed 'J.B.McP., trial judge', and signed by the plaintiff, is not a bill of exceptions (*Origet* v. *United States*, 125 U.S. 240, 243) . . ."

The Court goes on to say:

". . . but if it were to be treated as a bill of exceptions, as all the matters therein referred to depend for their solution upon an examination of the evidence which is not in the record, it follows that we have no means of determining whether reversible error arose from an action of the Court on any of the subjects to which the paper refers."

We assume our learned adversary derives some comfort from the last quotation, which is to be found on page 284;

but since the Court definitely holds "that the record contains no bill of exceptions," we assume that what follows with respect to the absence of any evidence upon which to determine whether there was reversible error in the charge was not by way of qualification of this positive rule, but rather by way of asserting an additional reason for affirming the judgment of the lower Court.

So that, as we read the two cases referred to by our learned opponent, we fail to see that they conflict with any of the respondent's contentions, or wherein they lay down any rule or follow any course which is contrary to any rule or course followed by our Circuit Court of Appeals, in so far as the issues raised by this petition are concerned.

Again, at page 4 of the petition, the petitioner charges that the Circuit Court of Appeals "failed to consider the bearing on the error in question of the statute of 'Harmless Error' or of the statute of 'Amendments' . . ."

The respondent is not prepared to agree that it would have been error on the part of our Circuit Court of Appeals to have ignored these two statutes in the light of its other conclusions, which, we submit, were correct.

The petitioner having emphasized its contention before the Circuit Court of Appeals that the lack of signature was mere harmless error, and the Circuit Court of Appeals having presumably considered the contention, it cannot be accurately stated that the Circuit Court failed to consider the two statutes referred to. Impliedly, if not expressly, the Circuit Court not only considered the statutes referred to, but gave its reasons for not applying them.

The petitioner further complains, at page 5 of the petition, that the Circuit Court of Appeals "erroneously ruled that the amendment necessary to cure the lack of authentication was one of substance, which could not be had after the term at which the judgments were entered had expired."

That the defect was one of substance the respondent believes has been adequately demonstrated.

The Court of Appeals holds in its opinion, 57 F. (2d) 44, at page 47 (Record, p. 269): "It is too late to send the case back for amendment as the term at which the judgments were entered has expired and the District Court has lost jurisdiction of the case.

> "*Exporters* v. *Butterworth-Judson Co.*, 258 U.S. 365.
> "*United States* v. *Mayer*, 235 U.S. 55, 67.
> "*Delaware, L. & W. R.R.* v. *Rellstab*, 276 U.S. 1."

On the authorities just cited by the Circuit Court of Appeals there seems to be virtually no doubt that the so-called bills of exceptions were not amendable after the expiration of the term.

The petitioner, at page 28 of its brief attached to the petition, concedes the general rule to be as stated in *Exporters* v. *Butterworth-Judson Co.*, 258 U.S. 365, 369, but contends that it is not without exceptions.

It is true that in *Michigan Ins. Bank* v. *Eldred*, 143 U.S. 293, this Court says that—

> ". . . save under very extraordinary circumstances, they [bills of exceptions] must be allowed by the judge and filed with the clerk during the same term . . ."

It is assumed by respondent's counsel that these "very extraordinary circumstances" are to be determined, in the first instance, by the Appellate Court to which they are submitted.

The respondent respectfully submits that nowhere on the record before this Court does it appear that there are "very extraordinary circumstances" which entitled the petitioner to relief by way of amendment or otherwise.

The petitioner cited the case of *Michigan Ins. Bank* v. *Eldred*, 143 U.S. 293, in which the doctrine of "extraordinary circumstances" was announced (Record, p. 296). The Circuit Court of Appeals cites that case, and must be pre-

sumed to have considered it in the light, among other things, of the petitioner's desire for an amendment to effectuate the so-called bills of exceptions, notwithstanding the expiration of the term. The Court also appears to have considered the later case of *Exporters* v. *Butterworth-Judson Co.*, 258 U.S. 365, in which this Court, at page 368, affirms *Michigan Ins. Bank* v. *Eldred*, 143 U.S. 293, and quotes therefrom the paragraph in which the doctrine of "extraordinary circumstances" is stated. Obviously, the Circuit Court of Appeals did not find that the lack of authentication was attended by such circumstances as to entitle the petitioner either to an amendment before the Circuit Court of Appeals or to a return of the cases to the District Court for such amendment. It is respectfully submitted that there were no facts, within or dehors the record, which would warrant that Court in finding that such circumstances existed.

After the opinion of the Circuit Court of Appeals was rendered a petition for rehearing was filed, to which the petitioner appears to have attached a document entitled "Request of Trial Judge," which is found at pages 312 and 312½ of the record, as extended; also another document entitled "Certificate of Clerk," which is to be found at pages 308 *et seq.*, also two other documents entitled "Certificate of Counsel" and "Affidavit of Louis B. King," which are found at pages 306, 307, and 308 of the extended record.

If these documents are to receive any consideration by this Court, the respondent desires to comment upon them, briefly.

From the affidavit of Mr. King it clearly appears that the trial judge had stated to Mr. King that he, the judge, desired to correct "his mistake"; Mr. King further observes the existence of a custom in this district "to consider bills signed either in the full name or with initials sufficiently authenticated . . ." The clerk recites portions of the docket, and also refers to the practice observed by Mr. King. The judge states, in substance, that while he attached his initials intending them to have the legal effect of a judicial

signature he acknowledges his "mistake" and absolves counsel from any contribution thereto. The judge further requests that the record be returned "for such correction by me as now within my power to make." The judge suggests that on the facts related by him he believes judgments were not properly entered, but awaits the approval of the Circuit Court of Appeals as to whether he "should strike the judgment entries from the docket as entered by the mistake of the Clerk, sign the bills of exception fully and order judgment on the original verdicts all now or as of August 20, 1930 with respect to signature and September 8, 1930, with respect to judgments."

Nowhere on this record does it appear that the respondent or its counsel had any notice that the documents above referred to were to be filed or that counsel were given an opportunity to reply if they so desired. However, the respondent respectfully submits that, with respect to the so-called practice referred to in the statements of Mr. King and of the clerk, that practice, if it is entitled to recognition as such, contemplates authentications by complete signatures and by initials, indiscriminately.

If such a practice has existed it seems to be sufficient to say that it was in obvious contravention of United States Revised Statutes, sec. 953, U.S. C.A. tit. 28, sec. 776.

It probably requires no authority to support the proposition that a statute cannot be abrogated by practice or usage.

Presumably these documents were attached to the petition for rehearing to persuade the Circuit Court of Appeals that the petitioner should have the relief it desired; but the Circuit Court of Appeals evidently saw no reason for departing from its previous conclusion, and denied the petition. This would seem to be further evidence that the Circuit Court of Appeals was not impressed with the existence of any extraordinary circumstances entitling the petitioner to the relief.

The only additional evidence offered by the petitioner, if it may be so regarded, is in the form entitled "Certificate

of James S. Allen, Clerk," incorporated in the present petition before this Court at page 8 thereof. Again there is nothing to indicate that there was any intimation to the respondent that such document would be filed, or that the respondent was invited to file any counter statement if it so desired. But, as a matter of precaution, the respondent respectfully submits that, in large measure, Mr. Allen's statement is merely cumulative with respect to the so-called practice previously commented upon. It differs from the previous statements in that it contains a list of cases in which bills of exceptions were said to have been authenticated by initials and in that ". . . this practice has never been commented upon, criticized or condemned by the judges of this Court or of said Circuit Court of Appeals so far as my deputies and I can recall."

The obvious answer to Mr. Allen's statement is that the point was never raised "until the above entitled cases were decided." The last quotation is from Mr. Allen's statement at page 9 of the petition.

This Court has said that it will not treat as precedents, nor will it attempt to differentiate, cases in which the precise issue was not raised.

Webster v. *Fall*, 266 U.S. 507, 511.

The petitioner cites *Barber Asphalt Co.* v. *Standard Asphalt Co.*, 275 U.S. 372, to the proposition that bills of exceptions should be amended after the term by addition of the signature of the trial judge where the defect was due to his fault.

The respondent assumes that in those cases in which purported authentications were rejected by this Court, the defect was primarily attributable to the judge.

Origet v. *United States*, 125 U.S. 240, 244.
Malony v. *Adsit*, 175 U.S. 281.
Oxford &c. Rd. Co. v. *Union Bank*, 153 Fed. 723.
United States (*ex rel. Kinney*) v. *U.S. Fidelity Co.*, 222 U.S. 283.

Furthermore, as we read the case of *Barber Asphalt Co.* v. *Standard Asphalt Co.*, 275 U.S. 372, it does not appear to be analogous to the case at bar. It dealt with equity rule 75 *b* which had been promulgated about seven years before that suit began. The Circuit Court of Appeals for the Seventh Circuit had, until that case arose, persistently ignored the rule by directing that evidence in equity suits be reproduced in full. In this case it heeded the objection that the record on evidence, so set forth, did not conform to the rule, and not only refused to consider the evidence, but affirmed the lower Court's decree. This being the first case which arose in that circuit in which the Circuit Court of Appeals invoked the rule, this Court held that the Circuit Court of Appeals went too far in the exercise of its discretion, and remanded the case upon substantial terms payable to the respondent in certiorari.

The case at bar is at law. The violation was of a statute in existence since 1875. The Court held consistently, in cases decided as early as 1887 and as late as 1928 that that statute must be strictly complied with, and that initials, by whomsoever, would not suffice. Moreover, in the two outstanding cases in which that rule was affirmed, the judgments of the lower Court were affirmed without apparent hesitation.

While this Court held, in the case of *Barber Asphalt Co.* v. *Standard Asphalt Co.*, 275 U.S. 372, at page 384, that failure to conform to rule 75 *b* was substantial error, and not mere harmless error, it further held that the Circuit Court of Appeals, sitting in equity, had power to remand the record on appeal for correction even after the term, but only because rule 75 *b* conferred discretion upon the Court to do so. At page 385 of its opinion in that case this Court approves the opinions of the various circuits which had held that the law relating to the effect of the expiration of the term upon appeals in equity does not apply to bills of exceptions at law.

Barber Asphalt Co. v. *Standard Asphalt Co.*, 275 U.S. 372, 385.
In re General Rule 75, 222 Fed. 884 (C.C.A. 6).
Struett v. *Hill*, 269 Fed. 247, 249 (C.C.A. 9).
Sussex &c. Co. v. *Midwest &c. Co.*, 294 Fed. 597, 600 (C.C.A. 8).
See also *United States* v. *Mayer*, 235 U.S. 55, 67.

The petitioner also cites *Taylor* v. *United States*, Advance Opinions of this Court, 1931-1932, page 662, as illustrating a case of extraordinary circumstances.

We agree that that case does disclose such a situation. We respectfully deny that the circumstances in the case at bar bear any resemblance to those in the Taylor case just cited.

In that case, at the request of the Assistant District Attorney, the completion and presentation of the bill of exceptions were postponed from time to time to May 17th, which happened to be a Sunday. Having completed his examination of the bill on May 16, the Assistant District Attorney went with the defendant's counsel to seek the judge's approval, but did not find him. This Court finds on undisputed evidence that "Failing to find him, they agreed to ask his signature on Monday, May 18th. On that day, with the express approval of all parties and in pursuance of the earlier agreement, the judge signed the bill. The considerable delay in settling the bill followed the request of the Assistant District Attorney in charge and was permitted for his convenience."

Nowhere on the record of the instant case does such a situation appear to be made out. The only assent given by the respondent was its original assent to the form and contents of certain alleged bills of exceptions filed on August 8, 1930. To be exact, however, it now appears that the alleged bills of exceptions contained in the record are not the bills of exceptions to which the respondent assented, since the proposed bills to which respondent had assented

were filed August 8, 1930 (Record, p. 7); whereas the bills filed on that date appear to have been amended on motion on August 20, 1930 (Record, p. 7), and without the assent of the respondent (Record, p. 311). In what respect the alleged bills were amended the respondent then had no knowledge (Record, p. 289).

On these undisputed record facts it may, indeed, be doubted whether the assents previously given by the respondent to the bills of exceptions in the form in which they were on the 8th of August, 1930, were effective even for the limited purpose for which they were given.

This Court has said that a stipulation as to the correctness of a bill of exceptions entered into during the term, which is, at best, all that the assent of the respondent's counsel amounted to, does not dispense with or waive a proper authentication by the judge.

Malony v. *Adsit,* 175 U.S. 281.

The point which this Court stressed in the Taylor case, *supra,* Advance Opinions, 1931-1932, page 662, is that counsel agreed, two days before the expiration date for presentation, to present the bill of exceptions for the judge's signature the day after such expiration. No such agreement was made or is contended for in the case at bar. Obviously, the ordinary assent to the form of a bill of exceptions, such as counsel for the respondent gave in this case, does not carry with it an agreement that the judge's signature may be affixed after the term or applied to bills as they may later be amended.

There was nothing to prevent the petitioner from examining the so-called bills of exceptions from August 20, 1930, when they purport to have been authenticated, to the end of the term. Clearly it was the petitioner's duty to see to it that the bills of exceptions filed by it were in proper shape for consideration by the Circuit Court of Appeals. It is submitted that it is not requiring too much of the pe-

titioner to determine whether or not the bills were properly allowed and authenticated before entering them in the Circuit Court of Appeals. Nor can it be said that the petitioner's reliance on the judge and its disappointment at the decision of the Circuit Court of Appeals constitute evidence of extraordinary circumstances such as would be required to take the case out of the rule which this Court has always been reluctant to relax.

Taylor v. *United States,* Advance Opinions, 1931-1932, p. 662.

Respondent's counsel have examined those cases cited by learned counsel for the petitioner on pages 29 and 30 of his brief attached to the petition, which were decided by this Court and which are claimed to be illustrations of exceptions to the general rule stated in *Exporters* v. *Butterworth-Judson,* 258 U.S. 365, 369, set forth at pages 28 and 29 of the petitioner's brief, and as a result of such examination the respondent begs leave to present the following brief comments upon them:

Exporters v. *Butterworth-Judson Co.,* 258 U.S. 365, is a case in which the bill of exceptions was rejected because it was signed after the term.

In *Walton* v. *United States,* 9 Wheat. 651, the bill of exceptions was signed within the term. The question was merely whether the authentication should relate back to the trial.

In *Muller* v. *Ehlers,* 91 U.S. 249, the exceptions were rejected because they were not submitted or signed until after the term and judgment was affirmed.

In *Jones* v. *Grover &c. Co.,* 131 U.S. Appx. cl, the bill of exceptions was rejected and judgment was affirmed.

In *Michigan &c.* v. *Eldred,* 143 U.S. 293, a petition for a writ of certiorari, containing a modified bill of exceptions signed after the term, was rejected.

In *United States* v. *Breitling,* 20 How. 252, the bill of ex-

ceptions was authenticated after the term, but this Court says, in *Muller* v. *Ehlers,* 91 U.S. 249, at 251, with reference to the Breitling case: ". . . it was probably for the reason that, upon the facts stated, the consent for further time beyond the term for the settling of exceptions might fairly be presumed. That case went to the extreme verge of the law upon this question of the practice and we are not inclined to extend its operation."

In *Dredge* v. *Forsyth,* 2 Black, 566, the bill of exceptions was filed and allowed within the term; the issue was simply whether execution should be sealed and allowed before the jury retired.

In *Hume* v. *Bowie,* 148 U.S. 245, the term was extended before its expiration by order of the judge.

In *Davis* v. *Patrick,* 122 U.S. 138, the opposing party consented within the term to extension beyond the term.

In *Waldron* v. *Waldron,* 156 U.S. 361, there was consent within the term to extension beyond the term.

Chateaugay &c. Co., Petitioner, 128 U.S. 544, was a case in which mandamus was granted to compel the judge to settle and sign a bill of exceptions on the grounds that the parties had relied upon an express order during the term. There was compliance with the pertinent rule of the Court, and consent of the plaintiff was inferred.

In *Hunnicutt* v. *Peyton,* 102 U.S. 333, the exceptions were signed within the term.

Thus it will be noted that in every one of these cases in which relief was granted after the term the Court found that the appellee had consented within the term to the postponement of the presentation or authentication of the bill beyond the term; or, the Court had so ordered within the term. The respondent includes in this category the case of *United States* v. *Breitling,* 20 How. 252, because of the interpretation put upon it by this Court in *Muller* v. *Ehlers,* 91 U.S. 249. In all other cases referred to it was either found that the term had not expired or the bills were rejected.

Conclusion.

In conclusion the respondent respectfully submits that the petitioner has failed to show that the Circuit Court of Appeals erred in holding that the bills of exceptions lacked proper authentication and that the defects were fatal, and that they were not amendable after the expiration of the term.

Dealing directly with the reasons for the issuance of the writs of certiorari alleged in the petition at pages 5 and 6 thereof, the respondent submits that they are somewhat vague and to a large extent inapplicable to the facts of these cases.

If the respondent correctly understands the alleged reasons, it submits that Congress has advisedly provided for the requirements of proper authentication of bills of exceptions and for terms of Court.

As to the requisites of proper authentication this Court has spoken in clear and unmistakable language in a series of uniform decisions, the last of which was handed down as late as 1928 and all of which are hereinbefore referred to and discussed.

As to the effect of the expiration of the term upon the jurisdiction of the Court in actions at law, this Court has likewise declared the law in no uncertain language in a long line of well-known cases, some of which have been referred to and discussed in this brief.

It is assumed by the respondent that such legislation and adjudications should not be lightly disregarded; on the contrary, they should be observed by all litigants who invoke the aid of the federal Courts. Such observance alone would conduce to regularity and uniformity of procedure, and would tend to avoid undue protraction of litigation.

To encourage the disappointed litigant, who has ignored such statutory requirements, to complain after the event that violations of them are but harmless errors is to put a premium upon laxity of practice; it is tantamount to nulli-

fying salutary laws, and tends to open the doors to a flood of uncertainty, confusion, and interminable litigation.

The petitioner has cited no case which indicates any lack of uniformity in the interpretation of the two statutes now under discussion.

And, finally, we have here a controversy between private corporations, begun in 1927, thoroughly tried before a jury and involving not over $20,000, including the counter claims of both litigants. The respondent cannot conceive of any question of public importance that is or can be involved.

It is submitted that the Circuit Court of Appeals has dealt with the situation in strict accordance with the mandates of this Court.

The respondent, therefore, respectfully prays that the petition for the writs of certiorari be denied.

Respectfully submitted,
THE A. L. SMITH IRON WORKS,
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